UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. THOMAS ALLEN DOOLEY, Defendant.	No. **CR01-4093DEO** **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

This matter is before the court on the motion of the defendant Thomas Allen Dooley ("Dooley") to suppress evidence. Dooley was indicted on October 25, 2001, on charges of possession of methamphetamine with intent to distribute, and being a felon in possession of a firearm. (*See* Indictment, Doc. No. 1, for details) Pursuant to the trial scheduling order entered October 29, 2001 (Doc. No. 5), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge for the filing of a report and recommended disposition.

The court held a hearing on Dooley's motion on May 24, 2002. Assistant United States Attorney Shawn Wehde appeared for the plaintiff (the "Government"). Dooley appeared in person with his attorney, Assistant Federal Defender Jeffrey Neary. The Government offered the testimony of Storm Lake Police Officers Jon Wacha and Jeff Mellencamp, and Detectives Mark Johnson and Kenny McClure. The following exhibits were admitted into evidence at the hearing, without objection: Gov't Ex. 1, a Statement of Rights form dated 01/17/2001, signed by Det. Johnson and Dooley; Gov't Ex. 2, Affidavit of Det. McClure dated September 17, 2001, in support of an application for a warrant to

search Dooley's house; Def. Ex. A, part of the Storm Lake Police Department Policies and Procedures Manual relating to the towing and impounding of vehicles; Def. Ex. B, Tow Sheet for a red-and-silver 2002 Chevrolet truck, license number 080 LBL. The court has reviewed the parties briefs, considered the evidence, and now finds this matter to be fully submitted and ready for decision. Before addressing the merits of Dooley's motion, the court will take up the matter of the motion's timeliness.

I. TIMELINESS OF THE MOTION

Dooley was arraigned on October 29, 2001. (Doc. No. 4) A trial scheduling order was entered the same day, scheduling this case for trial on January 7, 2002.[1] (Doc. No. 5) The trial scheduling order specified that "[a]ll pre-trial motions shall be filed within two (2) weeks after the date of the arraignment." (*Id.*, ¶ 2) Thus, the deadline for Dooley to file pretrial motions, absent leave of court, was November 12, 2001. No pretrial motions were filed during this time period, nor did Dooley file a motion for an extension of time.

Dooley filed his present motion and a supporting brief on April 24, 2002. (Doc. Nos. 17 & 18) Included within the motion is a request that the motion be considered timely filed. Dooley cites plea negotiations and discovery difficulties as the reasons he failed to file his motion within the time specified by the trial setting order. The plaintiff (the "Government") filed a resistance to the motion and a supporting brief on May 5, 2002 (Doc. Nos. 21 & 22). The Government asks that Dooley's motion be dismissed as untimely, arguing he has failed to show good cause for the untimely filing. (*See* Doc. No. 22, pp. 5-6)

[1]Dooley filed motions to continue his trial on December 17, 2001 (Doc. No. 10), January 30, 2002 (Doc. No. 12), and March 1, 2002 (Doc. No. 14). All three motions were granted. (Doc. Nos. 11, 13, & 15) Further, on April 8, 2002, the court continued the trial on its own motion, and the trial currently is scheduled for June 10, 2002. (Doc. No. 16)

The record indicates Dooley and the Government engaged in some plea negotiations, which ultimately reached an impasse in late 2001 or early 2002. Dooley cites the plea negotiations as one reason for his failure to file his motion by the deadline. However, the Government argues correspondence indicates the plea negotiations did not even begin until December 12, 2001, one month after the deadline for filing pretrial motions had passed.

As his second reason for the untimely filing, Dooley argues he made repeated inquiries and requests to obtain the Storm Lake Police Department's policies and procedures relating to vehicle seizures and inventories. Dooley claims the Storm Lake Police declined his requests, and he was forced to wait until the Government obtained the documents and then Dooley's counsel was able to review the documents at the U.S. Attorney's office. The Government argues Dooley has failed to show he made his inquiry within the time allowed for pretrial motions, claiming the first evidence of Dooley's inquiry to the Storm Lake Police Department is a letter dated March 11, 2002, some four months after the pretrial motion deadline had passed.

On this record, it is clear Dooley's motion was not timely filed, and no extension of time was sought or granted. Nevertheless, the court finds the Government will not be prejudiced by allowing Dooley's motion to be considered on its merits. The court further finds judicial economy would be served by allowing the motion to go forward, as doing so will obviate a possible appeal on the basis that trial counsel was ineffective in failing to file the motion timely or to request an extension of time. Therefore, the court **recommends** that Dooley's motion be considered timely filed.

The court turns now to consideration of Dooley's motion.

II. FACTUAL BACKGROUND

On September 17, 2001, Storm Lake Police Office Jon Wacha was working the day shift, from 6:00 a.m. to 6:0 p.m. At around 10:45 a.m., a citizen called the police to report

that a vehicle was driving recklessly on the road between Alta and Storm Lake, Iowa. The caller gave a detailed description of the vehicle, stating it was a late-model, red-and-silver Chevrolet pickup truck, with a license number of 080 LBL. The truck was being driven by a white male and was carrying an ATV. Officer Wacha left the police station to investigate, driving a marked patrol car. Officer Wacha was aware that there was an outstanding warrant for the truck's owner, Phil Pringle. The officer had never met Pringle, and did not know what he looked like.

Officer Wacha headed to the area of Lake Avenue and 9th Street in Storm Lake. He was stopped at a stop sign when he saw a vehicle that matched the detailed description provided by the caller. Officer Wacha activated his emergency lights and stopped the vehicle in the 100 block of West 9th Street, a residential area. The truck pulled over and parked, legally, on the side of the road.

Officer Wacha approached the driver's side of the truck and spoke with the driver. He told the driver why he had been stopped and asked for identification. The driver said he had no identification on him, and said his driver's license was at someone's house, pointing west down the street. The driver gave his full name as Thomas Allen Dooley, and provided his Social Security number. As Officer Wacha started to use his portable radio to call for verification of the driver's license status, Dooley stated his license was suspended. He was unsure of the reason for the suspension, which Officer Wacha testified is not unusual; people often are unclear as to the reason for a license suspension.

Officer Wacha asked Dooley to come back and sit in the patrol car. Dooley asked if he could bring his cigarettes with him, but the officer said he could not smoke in the patrol car. When Dooley got out of the truck, the officer noticed a large bulge in his front pants pocket. The officer asked if Dooley had any weapons, and Dooley said he did not. The officer then asked what the bulge was, and Dooley said it was money. The officer had some concern because the bulge was quite large, so he reached into Dooley's pocket to

confirm that the bulge was money. The officer pulled out a large roll of cash. When the officer asked why Dooley had so much cash, Dooley said either that it was to buy some equipment or it was for some concrete work. The officer returned the cash to Dooley, and Dooley returned it to his pocket.

When they reached the patrol car, the officer opened the driver's side back door, and Dooley sat down. He put his right leg inside the car, but his left foot remained outside the car on the ground. Dooley abruptly started to stand up, and the officer told him to sit back down. Dooley asked if he was under arrest and the officer said yes, he was. Officer Wacha testified it was his intent that Dooley understand he was not free to leave at that point.

Officer Wacha obtained verification by radio that Dooley's license was, indeed, suspended. As he began to write Dooley a citation for driving under suspension, another officer, Jeff Mellencamp, arrived at the scene. Officer Dooley told Officer Mellencamp to conduct an inventory search of the truck in preparation for towing and impound. Officer Wacha testified it is standard procedure for a vehicle to be impounded when the driver is found not to have a valid driver's license and the vehicle's owner is not present, with a valid license, to drive the vehicle away. Officer Mellencamp began searching the truck, while Officer Wacha remained in his patrol car and continued to write Dooley a citation for driving under suspension. Officer Wacha testified that at this time, it was his intention to issue the citation to Dooley, have him sign a promise to appear, and then release him, although this intention was never communicated to Dooley.

Shortly after Officer Mellencamp started searching the truck, he alerted Officer Wacha that he had found something. Officer Wacha went to the driver's door of the truck and looked inside. On the bench seat was a duffel bag containing a hard box. Inside the box was a large quantity of what the officers suspected to be methamphetamine. The box also contained a small amount of marijuana, a piece of tin foil, and glass pipes. Officer Wacha

returned to the patrol car and placed Dooley under arrest on state drug charges. He read Dooley his *Miranda* rights, and then transported Dooley to the Storm Lake Police Department so he could be questioned by detectives. Dooley had not made any incriminating statements prior to being advised of his rights.

Officer Mellencamp remained at the scene and completed a Tow Sheet on the vehicle (Defense Ex. 2). The Tow Sheet contains a number of check-boxes for officers to designate the reason a vehicle is being towed. These include:

Stolen Recovered
Impounded Vehicle
Snow Ordinance
Abandoned
Traffic Accident
Traffic Obstruction
OWI
Public Service
Other/Explanation

(Defense Ex. B) Officer Mellencamp checked the box designated "Other," but did not fill in the required explanation for that designation. Officers Wacha and Mellencamp both testified the "Other" box is used for vehicles that are towed due to the driver not having a license, driving under suspension, driving while barred, and the like. The officers explained the "Other" box is a catchall for any violation not specifically listed in the itemized boxes. It appears, on this record, that Officer Mellencamp may have checked the wrong box, in that the "Impounded Vehicle" box would have been more appropriate. However, Officer Mellencamp testified he normally includes in the "Other" category a vehicle that is towed because the driver's license has been suspended.

When Officer Wacha and Dooley arrived at the Storm Lake Police Department, Dooley was placed in an interview room. Detective Johnson again advised Dooley of his rights, and Dooley signed a form, witnessed by Detective Johnson, indicating Dooley understood his rights. (Gov't Ex. 1) Detectives Johnson and McClure questioned Dooley,

with Officer Wacha present during Dooley's initial questioning. Dooley was cooperative, in that he responded to questioning; however, he was frustrated, agitated, and did not make any incriminating statements, nor did he request a lawyer. Because it appeared Dooley was not willing to provide the officers with any information concerning the drugs in the truck, they terminated the interview, and Dooley was left alone in the interview room.

Half an hour to an hour later, Dooley knocked on the door of the interview room, which was locked from the outside. Officer Wacha opened the door, and Dooley said he wanted to talk to the detectives again. Dooley said he wanted to make a deal, and suggested that if he were released, he could purchase a half pound of methamphetamine in a controlled buy. Detective McClure contacted the County Attorney to relay Dooley's offer. The County Attorney made a counter-offer, which Dooley declined, and the interview was concluded after about 15 minutes. During this second interview, Dooley made some incriminating statements.

Detective McClure completed an affidavit which was transmitted to the Fort Dodge Police Department to support an application for a warrant to search Dooley's home. (*See* Gov't Ex. 2*)* The detective agreed the evidence supporting his affidavit consisted of the drugs and paraphernalia taken from the truck. Officers continued to hold Dooley in the Storm Lake interview room, rather than taking him to jail, to prevent Dooley from making a phone call and possibly arranging for the destruction of evidence prior to the time the Fort Dodge police could execute a search of Dooley's home. A search warrant was issued, and during the search of Dooley's residence, officers seized two shotguns, one of which was stolen; a letter or note attached to the door that appeared to indicate some drug transactions; and some paraphernalia.

III. DISCUSSION

Dooley seeks to suppress all the evidence seized from the truck and from his residence, and his statements at the Storm Lake Police Department. The parties are in agreement that if the evidence seized during the search of the truck is suppressed, then the evidence seized from Dooley's home also must be suppressed, as the warrant application was based on the items seized from the truck. Dooley argues his incriminating statements also must be suppressed, as they also arose directly from the search of the truck.

Dooley asserts the search of the truck was not a proper "inventory search," because it was not performed pursuant to "'standardize[d] police procedures, which vitiate concerns of an investigative motive or excessive discretion[.]'"[2] (Doc. No. 18, p. 3, quoting *United States v. Marshall*, 986 F.2d 1171, 1174 (8th Cir. 1993)) Dooley relies on the Storm Lake Police Department's policies and procedures for towing and impounding of vehicles, which provide, in pertinent part, as follows:

> II. Policy
>
> A. It shall be the policy of this Police Department to tow illegally parked vehicles, abandoned or derelict vehicles, vehicles which are inoperative at accident scenes and vehicles impounded subsequent to arrest or investigation.
>
> III. Definitions
>
> A. In accordance with the Police Department tow sheet[,] vehicles will be towed for the following reasons:
>
> 1. stolen recovered
>
> 2. impounded vehicle
>
> 3. snow ordinance
>
> 4. abandoned

[2]If Dooley had Pringle's permission to use the truck, then Dooley would have standing to challenge the search. *See United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998). Nothing in the record indicates Dooley did, or did not, have Pringle's permission to use the vehicle, and neither party has raised the standing issue.

5. traffic accident

6. traffic obstruction

7. OWI

8. public service

9. other/explanation

IV. Procedures

A. All vehicles towed as a public service will have a tow sheet completed with the vehicle's location after towing noted.

. . .

C. All towed and impounded vehicles by the Police Department will be inventoried on the tow sheets.

(Def. Ex. A)

Dooley argues the search of the truck in this case does not fall within the parameters of the Policies and Procedures set forth above. He notes that on the Tow Sheet (Def. Ex. B), Officer Mellencamp checked "Other/Explanation" as the reason the vehicle was towed, but failed to provide any explanation. He notes further that the Policies and Procedures fail to offer any type of definition or explanation for the "Other" category. Dooley argues this open-ended "Other" category allows officers to perform impermissible inventory-type searches as a "'purposeful and general means of discovering evidence of crime.'" (Doc. No. 18, p. 4, quoting *Marshall, supra*, 986 F.2d at 1175) Dooley claims if an officer conducts an inventory pursuant to written policies and procedures, but the policies and procedures themselves are improper or overly broad in scope, then the inventory search also is improper.

The Government argues the search of the truck was performed pursuant to the Policies and Procedures governing the impoundment of vehicles, and the Policies and Procedures themselves are proper "standardized procedures which vitiate concerns of an

investigatory motive or excessive discretion[.]" (Doc. No. 22, p. 7, citing *United States v. Rankin*, 261 F.3d 735, 740 (8th Cir. 2001)). The Government maintains the search should be upheld because there has been no "showing that the police failed to follow standard procedures, acted in bad faith or conducted the search for the sole purpose of investigation." (*Id.*, citing *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990)).

"When the government seeks to introduce evidence that was seized during a warrantless search, it bears the burden of showing the need for an exemption from the warrant requirement and that its conduct fell within the bounds of the exception." *United States v. Marshall*, 986 F.2d 1171, 1173 (8th Cir. 1993) (citing *Mincey v. Arizona*, 437 U.S. 385, 391, 98 S. Ct. 2408, 2412, 57 L. Ed. 2d 290 (1978) (internal citation omitted)). The *Marshall* court explained that one of the exemptions to the warrant requirement is what has come to be known as the "inventory exception," defined by the Supreme Court in *South Dakota v. Opperman*, 428 U.S. 364, 376, 96 S. Ct. 3092, 3100, 49 L. Ed. 2d 1000 (1976). *Marshall*, 986 F.2d at 1173-74. The "inventory exception" allows the police to "lawfully conduct a warrantless search of an impounded automobile that is designed to produce an inventory of the vehicle's contents." *Id.*

Following the reasoning outlined in *Opperman* and continued in *Marshall*, the Eighth Circuit Court of Appeals explained in *United States v. Hartje*, 251 F.3d 771 (8th Cir. 2001):

> When taking custody of property such as [a] vehicle, law enforcement officers may conduct a warrantless search and inventory in order to protect the owner's property, to protect the police against claims of lost or stolen property, and to protect the police from potential danger. *Colorado v. Bertine*, 479 U.S. 367, 372, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). The central inquiry in determining whether such an inventory search is reasonable is a consideration of the totality of the circumstances. *United States v. Marshall*, 986 F.2d 1171, 1174 (8th Cir. 1993). "[I]nventory searches conducted according to standardized police procedures, which vitiate concerns of an

> investigatory motive or excessive discretion, are reasonable." *Id.*

Hartje, 251 F.3d at 775-76.

In the present case, once the officers determined Dooley was driving under suspension, and without the truck's registered owner being present, with a valid license, to take possession of the truck, the officers clearly had the authority under the Policies and Procedures to tow the truck as a "vehicle[ ] impounded subsequent to . . . investigation." (Def. Ex. A) There is absolutely "no indication in the present case that the search was a subterfuge for a 'general rummaging' for evidence." *Hartje*, 251 F.3d at 776. Nor was there any indication the officers had singled out Dooley or the truck he was driving for special treatment; they simply responded to a citizen complaint, that gave a detailed description of the vehicle, and then took reasonable actions based on the circumstances. *See Marshall*, 986 F.2d at 1174.

Further, the fact that Officer Mellencamp failed to follow the policy to the letter by including an explanation of the reason for the tow, or in the alternative checked the wrong box altogether, does not, standing alone, render the inventory search unreasonable. *See United States v. Mayfield*, 161 F.3d 1143, 1145 (8th Cir. 1998) (inventory searches not "always unreasonable when standard procedures are not followed," citing *United States v. Woolbright*, 831 F.2d 1390, 1394 (8th Cir. 1987); *United States v. Trullo*, 790 F.2d 205, 206 (1st Cir. 1986); *Whren v. United States*, 517 U.S. 806, 816, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996)).

Once beginning a valid inventory search, the officers had the right to "keep their eyes open for potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime." *Hartje*, 251 F.3d at 776.

There is no support for Dooley's argument that the inventory search of the truck violated his Fourth Amendment rights. As a result, the evidence obtained from the search of the truck, and from the later search of Dooley's residence that relied upon the evidence seized from the truck, should not be suppressed.

To the extent Dooley's incriminating statements at the police station arose from the fact that incriminating evidence was found in the truck, those statements also should not be suppressed. [3]

[3]The court leaves for the trial court's determination any question as to whether those statements may be inadmissible for other reasons, such as because they may have been made in the course of plea negotiations.

IV. CONCLUSION

IT IS RECOMMENDED, unless any party files objections[4] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Dooley's motion to suppress evidence be **denied**, in accordance with the court's recommendations set forth above.

IT IS SO ORDERED.

DATED this 31st day of May, 2002.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[4]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).